IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. _____

CURTIS B. DANNING, as Trustee in Bankruptcy of Matador Bowl, Inc., a California corporation, Bankrupt,

Petitioner,

vs.

BRUNSWICK CORPORATION, a Delaware corporation, A. B. MALOUF,

Respondents.

EMANUEL LEVY,

Petitioner,

vs.

BRUNSWICK CORPORATION, a Delaware corporation, A. B. MALOUF,

Respondents.

PETITION FOR WRIT OF CERTIORARI

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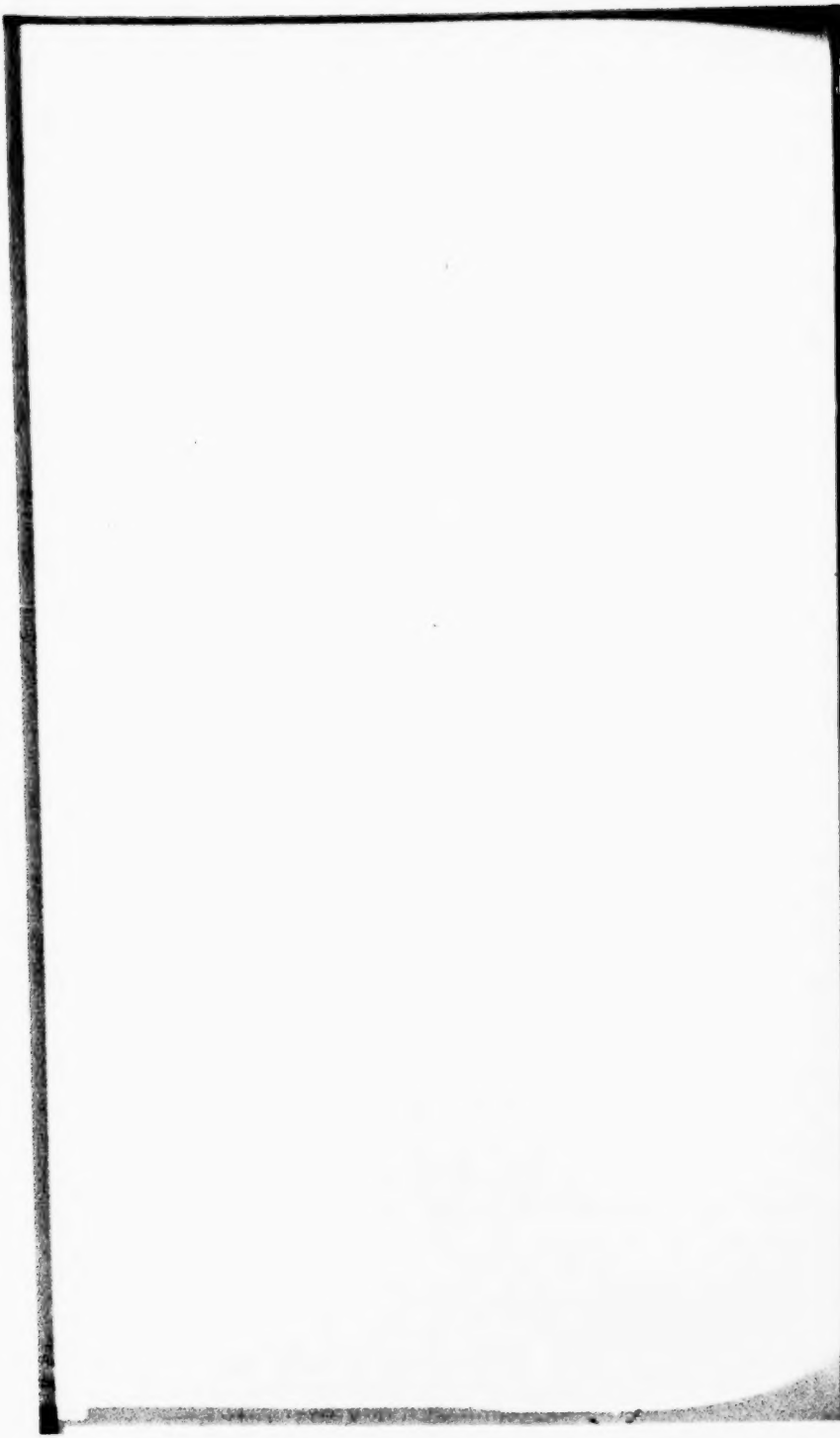

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the

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United States Court of Appeals for the Ninth Circuit entered in these consolidated proceedings September 18, 1972.

OPINION BELOW

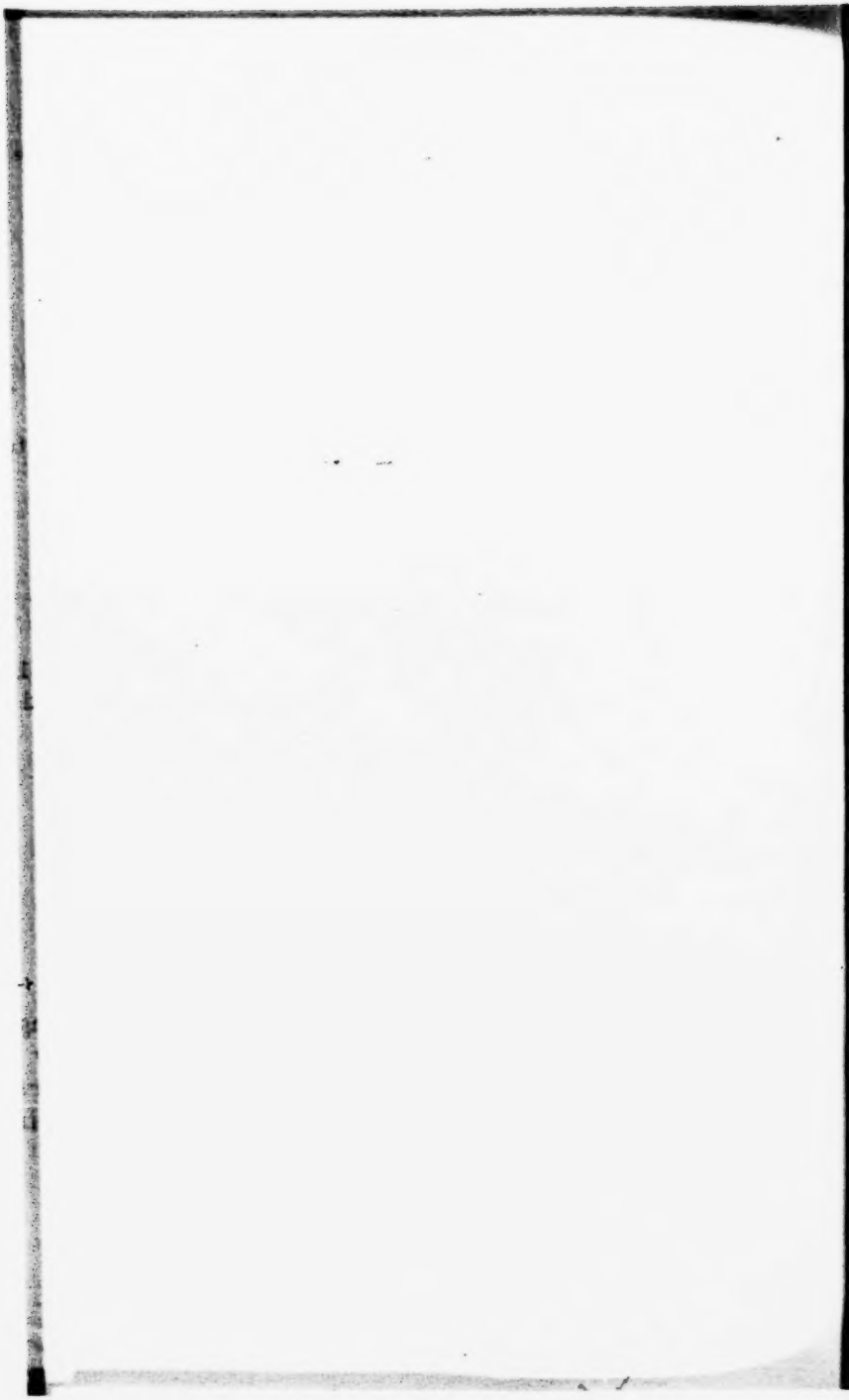
The Opinion of the Court of Appeals, not yet reported, appears in Appendix A hereto.

JURISDICTION

The judgment was entered September 18, 1972. No petition for rehearing was filed and this petition is filed within 90 days of the last mentioned date. This Court's jurisdiction is invoked under 28 U.S.C., sec. 1254(1).

QUESTIONS PRESENTED

1. Whether a controversy involving the vertical acquisition of a bowling center by one of the two major manufacturers and sellers of bowling alley equipment and owner of a chain of bowling centers, and involving questions of combination and conspiracy with the lessor of the subject acquisition, the refusal by both to trade and deal with a potential competing



operator, and the resultant elimination of competition at a bankruptcy sale, can properly be disposed of by summary judgment.

2. Whether the antitrust claims, under the facts postulated above, and expressly reserved by the trustee in bankruptcy at the bankruptcy sale in which he announced he was selling a going business (including good will), can be defeated merely by the fact that his time to assume the lease to the bowling center and the conditional sales contracts to the fixed bowling lanes and equipment had expired.

3. Even if the previous Question is determined in the affirmative, whether the claims in antitrust of the excluded potential competitor, eminently qualified to purchase the bowling lanes and equipment, and to lease and operate the bowling center, are foreclosed.

4. Whether a person, actually engaged in the operation of bowling centers, who had the means, intent to lease and purchase and who negotiated for the lease and property but who was excluded, has standing to sue under Section 4 of the Clayton Act.

[Note: There are other questions which, while not dealt with by the Opinion below, were disposed of adversely to Petitioners by the district court in extensive findings of fact and

conclusions of law and implicitly affirmed by the Court of Appeals, and which this Court may wish to consider. They are discussed in Reason IV for issuance of the writ, infra.]

STATUTORY PROVISIONS INVOLVED

The statutes involved are Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§1, 2; Sections 4 and 7 of the Clayton Act, 15 U.S.C. §§15, 18; 11 U.S.C. §110; and 18 U.S.C. §152, cl. 5. They appear in Appendix B hereto.

STATEMENT OF THE CASES

1. Jurisdiction of the Courts Below.

The jurisdiction of the district court was invoked because of questions which arise under Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. The cases (in which jury trials were demanded) were consolidated in the district court.

Petitioner Danning, a trustee in bankruptcy, sued for treble damages when Respondent Brunswick, one of the two major manufacturers and sellers of bowling equipment and owner of a chain of bowling centers, allegedly combined and conspired with Respondent Malouf, the lessor of a bankrupt bowling center, to acquire the bowling business at the bankruptcy sale without competitive bidding.

Petitioner Levy, an eminently qualified bowling center operator, sued for treble damages and divestiture when he was refused the lease and equipment and was in effect excluded from bidding at the bankruptcy sale.

Petitioner Danning appealed to the Court of Appeals, in accordance with 28 U. S. C. secs. 1291, 1294(1), from an adverse summary judgment entered May 16, 1969.

Petitioner Levy, on the same record, appealed from an adverse summary judgment entered several months later, November 24, 1969.

The consolidated record on appeal consisted, in addition to the Clerk's Transcript, of 1) Depositions of Respondents; 2) Reporter's Transcripts of argument had on May 5 and November 17, 1969; and 3) Reporter's Transcript in the bankruptcy proceedings.

The facts recited here are taken from this record without page references, since the record is not yet before the Court.

Essentially, the actions charge the respondent Brunswick, one of the two major interstate manufacturers and sellers of bowling equipment and operator of a large chain of bowling centers, with violations of Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act, and respondent Malouf with violation of Section 1 of the Sherman Act.

2. Brunswick Corporation and the Bowling Industry

These are the first actions which challenge Brunswick's policy of acquiring bowling centers.

The advent of the automatic pinsetter revolutionized the sport of bowling and changed what was a local sport conducted in shabby surroundings to a national sport conducted in modern, attractive centers.

There are approximately 33 million persons bowling in 9,000 establishments throughout the country. Petitioner Levy averred that Brunswick and American Machine

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& Foundry Company, Inc., for all practical purposes, manufacture, sell, and distribute almost 100% of all automatic pinsetters and bowling equipment.

Brunswick admits to the following statistics:

It manufactures, sells and supplies between 35 and 40 percent of all the bowling equipment sold in the United States and that between 30 and 35 percent is manufactured and sold by American Machine & Foundry Company. The remainder of the market in the United States for bowling equipment is shared by a number of smaller companies.

During the years 1965 and 1966, Brunswick shipped its bowling equipment into every state in the United States. Its sales volume for bowling equipment in the United States in those years was approximately $63,000,000 and $48,000,000, respectively, of which about ten percent was allocable to the State of California. Of the approximately 9,000 bowling centers in the United States, Brunswick sells its equipment to more than 6,000 of them, including about half of the bowling centers in the State of California.

During the years 1965, 1966, 1967 and 1968, Brunswick operated bowling centers in the United States and in the State of California

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as follows:

Year	United States	California
1965	131	13
1966	178	22
1967	184	26
1968	163	23

During the same years, Brunswick operated 11 bowling centers in Los Angeles County including Matador Bowl in the San Fernando Valley, involved herein.

The following is also undisputed.

Matador Bowl competes with a number of independent bowling centers in the San Fernando Valley, a suburb of Los Angeles. Brunswick's other bowling centers compete with independents in the Los Angeles metropolitan area.

There follows the names and addresses of bowling centers within a five mile radius of Brunswick's Matador Bowl, the subject of the controversy. The asterisk means that the center is a Brunswick equipped and supplied house.

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*Bowlerland - 32 lanes
7501 Van Nuys Boulevard, Van Nuys

Canoga Park Bowl - 32 lanes
20122 Van Owen, Canoga Park

*Granada Lanes - 48 lanes
10823 Zelzah, Granada Hills

Panorama Bowl - 48 lanes
8750 Van Nuys Boulevard, Van Nuys

Reseda Bowl - 32 lanes
6642 Reseda Avenue, Reseda

*Ronnell Bowl - 32 lanes
12385 San Fernando Road, San Fernando

Van Nuys Bowl - 10 lanes
14540 Friar Street, Van Nuys

Victory Bowling Center - 24 lanes
6300 Sepulveda Boulevard, Van Nuys

In addition, Brunswick's Hollywood Legion Bowl in Hollywood, California, is less than four miles from La Cienega Lanes, owned by a corporation of which Petitioner Levy is a principal stockholder.

Petitioner Levy averred, without contradiction, that five miles is the area of competition, that on a five mile basis, Brunswick owns [and operates] 11% of the

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bowling centers and on a two mile basis, 33%.

[The record does not disclose how much the other major power in the industry, American Machine & Foundry, has of the "retail" market, but Petitioners, if given the opportunity, intended to show that the acquisitions by both Brunswick and AMF, have threatened the existence of the independent bowling center operator.]

As noted in the Opinion below (ftn. 2), [during the 1960's] a large number of centers became financially unsuccessful, and Brunswick, as one of the two major manufacturers, would frequently repossess centers and operate them as so-called distressed situations.

It should be noted, however that: (i) (unnoted in the opinion of the Court below) in 1965, Respondent Brunswick's announced policy to the industry was that it was not going into the business of operating bowling lanes or centers except to protect its investment; and (ii) (also unnoted below) Matador Bowl, the subject of the controversy, was not a distressed situation in which Brunswick acted to safeguard its investment. Indeed, early in February, 1966, Petitioner Levy was told by Respondent Brunswick that he could buy Matador Bowl for $330,000, being more than $100,000 above what was owed it; and when he questioned the price, he was told that Matador Bowl was one of the better centers and that Brunswick wanted

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to make up for some of the unsuccessful ones it had acquired.

An officer of Brunswick, who had priced out Matador at $300,000 to $400,000 and had worked quickly and secretly to acquire it for Respondent, deposed:

That while Respondent Brunswick's general policy is to keep its customer operating, it frequently cannot do this and must move in to salvage its investment. In the case of Matador Bowl, it was not seriously delinquent to Brunswick who preferred to operate rather than remove the equipment.

That whether Respondent Brunswick would permit a responsible party to operate after making Brunswick whole, that party could have bought the equipment directly from the lessee and Brunswick would have transferred the indebtedness. Not so in the case of Matador Bowl, because the equipment went into "its inventory" and Respondent Brunswick had "firm selling prices." By its inventory was meant that Brunswick had title. [Note: Brunswick did not have title at the time of Petitioner Levy's meeting in February, 1966, when it offered to sell him Matador Bowl at a price which would yield it more than $100,000 profit.]

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3. Malouf.

Respondent Malouf was the owner of the real property and improvements located in Northridge, Los Angeles County, California, at which his lessee, Matador Bowl, Inc., operated a bowling center with lanes, pin-setters and equipment sold to it on conditional sales contracts by the Respondent Brunswick.

When first contacted by Levy after Matador's bankruptcy, Malouf was encouraging about the prospects of accepting Levy as a tenant in place of Matador. Later, he refused Levy a lease, referring him to Brunswick, to which he had already leased the bowling center within a month after the adjudication of bankruptcy.

4. The Bankruptcy and Negotiations for Matador Bowl.

On December 29, 1965, Matador Bowl filed a voluntary petition in bankruptcy. At that point Matador Bowl owed Respondent Brunswick a balance of some $176,000 on the conditional sales contracts, although it was not seriously delinquent in its monthly payments.

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Respondent Brunswick under agreement with Petitioner Danning, as Trustee, immediately went into possession of the premises, retained the books, records and contracts, and operated Matador as agent for the Trustee.

On January 27, 1966, without the knowledge of Petitioner Danning, and approximately only a month after the adjudication of bankruptcy, Respondents executed a lease between them, conditioned on the rejection by the Trustee of the existing Matador lease.

After the Matador adjudication, Petitioner Levy, an eminently qualified independent operator, attempted to negotiate with all parties, Brunswick, Malouf, and Danning, to take over the lease, conditional sales contracts, and was prepared to bid at the bankruptcy sale for the remaining assets as a going business.

Early in February, 1966, in Chicago, Petitioner Levy met with officers of Respondent Brunswick. He was told that he could buy Matador for $330,000, being more by at least $100,000 than was owed to Brunswick, that the price was intended to make up for some of Brunswick's losses elsewhere, and that he should not bid at the sale because "we have already tied up the premises with a lease."

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Petitioner Levy's attorney had written two letters to Respondent Brunswick. In one Respondent Brunswick was told of Levy's interest in purchasing the business of the bankrupt and requesting pertinent information. The letter also referred to Respondent Brunswick's announced policy to acquire bowling centers only to protect its investment. No answer was received to this letter. Subsequently counsel wrote again, referring to Levy's conversation in Chicago, and claiming that Respondent Brunswick's conduct was improper. Respondent Brunswick's answer was completely negative, although there was no denial of Petitioner Levy's version of the Chicago conversations.

About the same time, Petitioner Levy's counsel was in communication with Respondent Malouf's counsel. First, there was a telephone conversation, confirmed by a letter from Petitioner Levy's counsel, that Respondent Malouf would entertain an offer from Petitioner Levy for a lease. Then, there was silence from Respondent Malouf's counsel in that he failed to answer telephone calls. Next, there was a letter from Petitioner Levy's counsel questioning this behavior as sinister. Finally, there was a response: "Again, as I indicated to you (evidently over the telephone on the very first occasion), Mr. Malouf has no particular preference as between financially responsible parties who may want to lease this property." And then what was not indicated before:

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"Under the circumstances, however, it would seem that your client must either obtain an assignment of the lease from Brunswick or an offer on its part to cancel the new lease, before Mr. Malouf could enter into a new lease with your client."

Petitioner Danning, the Trustee in Bankruptcy, did not know that Respondent Brunswick had tied down the lease or that it would not turn over its equipment under conditional sales contracts until Petitioner Levy returned from his Chicago meeting with Respondent Brunswick officials and reported its demands.

5. The Bankruptcy Sale.

The bankruptcy sale was held April 28, 1966, before a referee in bankruptcy. The following is taken from the transcript which is a part of the record below.

> "MR. RASKOFF (attorney for Trustee): Before offering the property for sale, I would like to state on the record something which Brunswick has already been advised of, but I don't want there to be any misunderstanding as to the position of the estate. They have made some

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kind of arrangement with the landlord here which, in effect, knocks any other bidder out of the box, because they have control of the premises. They have been advised by their attorneys that they were acting within their rights, and perhaps they were, but I want to state this on the record: That in offering this for sale, if Brunswick should be the high bidder, we are doing so without waiving any rights for any cause of action that this estate may have with respect to Brunswick's conduct in eliminating the interest of one highly qualified bidder, so, to the extent that that may be actionable, we are reserving our rights and we intend to investigate it and do whatever may be appropriate." 1/ (Emphasis supplied.)

"THE REFEREE: Mr. Raskoff, do you think this is a matter I should refer to the FBI for investigation under Section 152, Title 81 [sic]?

"MR. RASKOFF: Not at this time. I know what the facts are, your Honor. This is a problem we

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1/ Despite the above, the Court of Appeals in footnote 4 to its Opinion commented: "We note that the trustee took no steps to set aside the sale in the Bankruptcy Court."

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have in all bankruptcies, your Honor, where you have items in place that have value only in place. The smart business man has almost invariably gone to the landlord to tie up the premises so that no one else can bid anywhere near the fair value, because the premises are locked up. Our problem is with someone occupying the place in the industry that Brunswick does, Brunswick has a very significant percentage of the bowling business in the United States, I am sure. I don't know that to be a fact, but I would wager on it. I think we have a situation where there may possibly be a cause of action. I know we face this in all bankruptcies. I know that, because a landlord generally has an advantage over other bidders, but in this case the landlord indicated that he would be delighted to lease the premises to anyone who was financially qualified, and we thought we had produced such a man, but he couldn't get a lease because Brunswick had tied it up, so this is the right I want to preserve.

"THE REFEREE: It seems to me this would come under Subdivision 5 of Section 152, and I want you to give that a lot of careful consideration."

"MR. RASKOFF: I would do that, your Honor.

"MR. CATLIN (attorney for Brunswick):

". . . [Brunswick] is a substantial creditor of this estate, with secured accounts running approximately $200,000.00 and its unsecured account is about five thousand. Talks, as I said, were begun with the bankrupt and its attorneys and the landlord, and ultimately a lease was taken from the landlord, because without a lease Brunswick's position was that it couldn't very well bid for these assets without a place to keep them. Actually, there is always someone in a bankruptcy that has a certain advantage, and the landlord in a business that has fixtures such as this restaurant and bar equipment has an advantage, and with a lease Brunswick has that same advantage, and there is a lease.

"THE REFEREE: Well, I urge you to read Subdivision 5 of Section 152, Title 18, of the United States Code. It seems to me, just from your own statement, there has been a violation of that section, counsel." 2/

2/ The complaints in both cases herein, in the course of alleging violations of the

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* * *

"MR. RASKOFF: If the Court please, I am not convinced at the moment that there is a deal with the landlord. That wasn't made until after the bankruptcy. We were requested by Mr. Quittner, counsel for the bankrupt in this case, to consent to a termination of the master lease. I had advised Mr. Quittner that we would do that provided the termination would not be effective until after the sale of these assets, since we wanted to preserve the possibility of competitive bidding. 3/ Mr. Quittner said that that was fine and

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2/ (Continued from preceding page)

antitrust laws, refer to this asserted violation of the criminal law. Please see discussion of the so-called "plus elements" in antitrust cases in Sunkist Growers, Inc. v. Winckler & Smith Citrus Prod. Co., 284 F. 2d 1, 16-17 (CA 9, 1960).

3/

This points up conflict between bankruptcy rules and antitrust laws which the Court below failed to appreciate. (See ftn. 6 of Opinion.)

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that I could hold the termination until there was a sale. Subsequent to that time we were advised, for the first time, by the landlord, after we had introduced a perfectly qualified bidder to the landlord, who had just a few days prior said he would make a lease with any qualified person, that in the two days preceding a lease had been signed with Brunswick, so I asked to see a copy of the lease, and I got it from the landlord's attorney, along with a letter that its effectiveness was conditioned upon not the usual words, subject to their being able to buy the assets, but it was conditioned upon the termination of the prior lease between the bankrupt's principals, not the bankrupt, and the lessor, and I don't know whether that has been terminated or not, but the voluntary termination I am satisfied can be stopped, because we wouldn't agree to it. . . . ."

"MR. DANNING: I would like to inquire if there is anyone besides Brunswick Corporation who is prepared to bid for this business as a going business? 4/ There being no

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4/ The Trustee had advertised "FOR SALE AS A GOING BUSINESS MATADOR BOWL." Brunswick responded to the offer by buying

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response -- (Emphasis added).

"MR. MAURICE PELON: I would, except this seems to be a tied-up situation. It is sort of a locked-in situation, and it is pretty hard to go out on a limb and bid and not know where you end up.

"MR. DANNING: I take it that means you are not prepared at this time to bid for it as a going business?" (Emphasis added.)

"MR. PELON: If the lease is gone, there is no way I can.

"MR. DANNING: Does that mean you are not prepared to bid?

"MR. PELON: Yes, it does.

"MR. DANNING: Apparently, your Honor, there will only be a single bidder for this business as a going business.

4/ (Continued from preceding page)

the going business. Yet the Court below (Opinion, page 4) held that "The basic defect in their contentions [i.e., violations of the antitrust laws], briefly stated, lies in the fact that the trustee had no business to sell."

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"MR. RASKOFF: Mr. Danning, may I inquire of Mr. Catlin, because the last time I talked to Mr. Catlin and the attorney for the landlord the lease that they had was conditional. Is the lease now unconditional?

"MR. CATLIN: As far as I know, it is still conditional in the same respects that it was."

[Petitioner Levy, who was the "perfectly qualified bidder" mentioned by Petitioner Danning's attorney, averred that he did not bid at the bankruptcy sale because, as stated by another potential bidder at the sale (Pelon), the situation had been "tied-up" -- Respondent Brunswick had the lease and the equipment would have to be removed, making it worth considerably less than in place.]

"THE REFEREE: . . . Is anyone else interested in bidding on all of the items as a going business? (Emphasis added.)

"MR. PELON: I will again state to your Honor if this wasn't complicated with this lease situation I would be definitely interested in bidding.

"MR. DANNING: Apparently there are no other bidders, and, under the circumstances, I would recommend

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confirmation.

"THE REFEREE: Very well. The sale will be confirmed to the Brunswick Corporation for $21,500.00, plus the wholesale cost on the liquor and other supplies."

The result of the sale was that Brunswick acquired not a "distressed situation," but a going business including good will, without competitive bidding, and at a price of about $266,000, 5/ some $100,000 less than it offered it to Levy or the value put on the property by Brunswick, before the bankruptcy sale and the expiration of the trustee's time to assume the lease and the conditional sales contracts -- some $100,000 which otherwise would have redounded to the benefit of the bankruptcy estate.

5/ The approximate total of the balances on the two conditional sales contracts with Brunswick, one with a supplier of kitchen equipment, and what Brunswick paid at the bankruptcy sale.

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REASONS FOR GRANTING THE WRIT

I. The Decision Below, Involving the First Antitrust Acquisition Controversy in the Bowling Industry and Not Merely Questions of Bankruptcy or Commercial Law, Should Not Have Been Disposed of by Summary Judgment. It Is in Conflict With Applicable Decisions of This Court With Respect to Summary Judgment in Antitrust Cases.

The decisions below dispose of the controversy on the basis of language used by this Court in First National Bank v. Cities Service Co., infra, a case, Petitioners submit, wholly unlike theirs, when it should have denied summary judgment on the criteria enunciated in Poller v. Columbia Broadcasting System, 368 U.S. 464 (1962) and The White Motor Company v. United States, 372 U.S. 253 (1963). Cf. Fortner Enterprises, Inc. v. U. S. Steel Corp., 394 U.S. 495, 505-506 (1969).

The applicable cases hold that summary judgment in antitrust cases is disfavored and should rarely be granted; it is inappropriate where motive, intent and acquisitions are

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involved, and where the issues are not clear-cut, simple, but are of far-flung import.

Petitioners are not just anyone who have filed an antitrust complaint without significant probative evidence tending to support their complaint, as suggested by the Opinion below, citing language[6/] in First National Bank v. Cities Service Co., 391 U.S. 253, 290 (1968).

Petitioners for themselves and for the public are able to make and did make a showing which makes the First National Bank case dictum cited below inapplicable to them.

Petitioner Danning is a Trustee in Bankruptcy who was compelled to sell a truly viable business to Respondent Brunswick at a price in effect at least $100,000 less than

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6/ "While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint."

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Respondent Brunswick was willing to sell it to Petitioner Levy -- because Respondent Brunswick combined with Respondent Malouf in restraint of trade or unilaterally and illegally refused to deal.

Petitioner Levy is an eminently qualified independent operator who was for all intents and purposes prevented from bidding at the bankruptcy sale by the same combination and conspiracy, or illegal unilateral refusal. Moreover, the Court of Appeals in effect ignored his rights which were independent of the Trustee's and were based on his own standing under Section 4 of the Clayton Act, and not upon what the Trustee did or did not do with respect to affirming the lease or conditional sales contracts.

The Opinion below states (p. 5):

> "After the trustee had rejected the lease and conditional sales contracts, Malouf and Brunswick were free to deal with each other or with anyone else, or not to deal at all, so long as their refusal to deal with Levy did not restrain trade."

But Respondent Brunswick was not an ordinary trader. Because of its dominance, even alone it could not with impunity misuse or

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abuse 7/ its position and refuse to trade [Poller v. Columbia Broadcasting System, 368 U.S. 464, 469 (1962)]; it could not in concert with Malouf refuse to trade [cf. Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207, 212 (1959)], and even though Malouf was not a trader [Nash v. United States, 229 U.S. 373, 379 (1913)].

In referring to the so-called rejected lease and conditional sales contracts and to its own decision in Bushie v. Stenocord Corp., 460 F. 2d 116 (CA 9, 1972), a case involving termination of a distributorship contract where there was no showing of monopoly power in the single manufacturer (460 F. 2d at p. 121), the Court below in effect held that in the cases at bar there was only a private quarrel, just as there was in other distributorship cases, including Feddersen Motors v. Ward, 180 F. 2d 519 (CA 10, 1950), the premise of which, Petitioners submit, was repudiated in Klor's, Inc. v. Broadway-Hale Stores, Inc., supra.

7/ Petitioners claimed below that Respondent Brunswick was not just another competitor for the lease and what it did in tying up the lease was not legitimate in the circumstances.

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The Opinion below also states:

". . . None of the facts appearing in this record permit an inference that Malouf and Brunswick conspired to restrain trade, or that Brunswick's operation of a bowling center at the Matador site would affect competition in the relevant market in the Los Angeles area7/." (Emphasis added.)

But footnote 7 in part reads:

"Brunswick, during the period of the events under consideration, operated 22 bowling centers, approximately two percent of the total number of centers, in the State of California." (Emphasis added.)

Thus, while the text refers to "the Los Angeles area," the footnote widens the relevant area to the State of California.

Whatever the area, the decision below overlooks the fact that Brunswick is a monopolist in manufacturing throughout the United States, with the power to fix prices, and overlooks the law that in this setting, the percentage of the market foreclosed by the vertical arrangement is not decisive. [Cf. Brown Shoe Co. v. United States, 370 U.S. 294, 329 (1962);

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United States v. Aluminum Co. of America, 377 U.S. 271, 280 (1964).]

This Court has stated:

> ". . . In any event, a narrow focus on the volume of commerce foreclosed by the particular contract or contracts in suit would not be appropriate in this context. As the special provision awarding treble damages to successful plaintiffs illustrates, Congress has encouraged private antitrust litigation not merely to compensate those who have been directly injured but also to vindicate the important public interest in free competition" [Fortner Enterprises, Inc. v. U.S. Steel Corp., 394 U.S. 495, 502 (1969)].

True, this was stated in the context of tying arrangements; but it would appear to be sound dicta applicable here [cf. United States v. Aluminum Co. of America, supra].

Moreover, Fortner, following Poller, held that summary judgment was inappropriate on the issue of "the possibility of market power" (394 U.S. at p. 506).

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The Court of Appeals should have concluded as it once did in Sunkist Growers, Inc. v. Winckler & Smith Citrus Prod. Co., 284 F. 2d 1, 17 (CA 9, 1960), that

> "the question as to whether there had been a concerted refusal to sell . . . or an illegal unilateral refusal to sell, were questions of fact for the jury."

As will be demonstrated under other headings, these cases present important questions which have not been, but should be, settled by this Court, and are the first to arise by reason of vertical integration by one of the two major powers in the bowling industry. The public interest requires review of a decision which summarily disposes of these important questions.

II. The Cases Present an Important Question That Has Not Been, But Should Be, Settled By This Court, Concerning the Impact of Bankruptcy or Commercial Law on Antitrust Claims.

Petitioners assert that the controversy involves an acquisition by one of two dominant powers in the bowling industry in combination, if not conspiracy, with a lessor, to the exclusion for all practical purposes of an independent buyer who was ready, able, and willing to bid

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in open competition; and that their claims cannot be defeated by a mechanical application of bankruptcy or commercial law.

The Court of Appeals holds:

> "The basic defect in these contentions (antitrust violations), briefly stated, lies in the fact that at the time of the sale the trustee had no business to sell. He had not seen fit nor taken the steps necessary to preserve the business as an integral unit, but had allowed the major components to revert to the creditor-owners. Thus, neither Malouf nor Brunswick were obliged to accede to the trustee's demands." (Opinion, p. 4.)

And:

> "Nor do the antitrust laws make unlawful either Malouf's choice of tenant for his property, or Brunswick's refusal to allow Levy to take over the purchase contracts on which Matador had defaulted. After the trustee had rejected the lease and conditional sales contracts, Malouf and Brunswick were free to deal with each other or with anyone else, or not to deal at all, so long as their refusal to deal with Levy did not restrain trade." (Opinion, p. 5.)

The court below thus decided disputed questions of fact: 1) whether the Trustee was selling a going business, 2) whether there were not estopping circumstances to the failure not to assume the lease and conditional sales contracts (see The Bankruptcy Sale, supra, p. 15, et seq.), and 3) what constitutes "major components" of the transaction; and in doing so, the court raised technical application of bankruptcy or commercial law above overriding application of the antitrust laws.

Petitioners submit that in any event, the relevancy of such disputed findings in the circumstances of these cases is dubious, since they beg the question as to the legitimacy of the entire transaction as being in restraint of trade.

The controversy here does not involve what the opinion below makes it seem to involve, a technical question of bankruptcy or commercial law; nor does it involve, as also suggested, the mere exercise by a corporation of business acumen to obtain a good deal for itself.

Nor, does it involve, as again the opinion below make it appear, the right of an ordinary producer or trader not to deal

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with a distributor or customer. 8/

These cases should have been treated as ones in antitrust, giving due consideration to the obligation of the monopolist to trade and deal, which overrides the merely technical and mechanical application of bankruptcy or commercial law.

What of the rights of Petitioner Levy? Even if the Trustee is foreclosed because he did not assume the lease and conditional sales agreements, Levy's right to compete against the combination of the monopolist, Brunswick, and the lessor, Malouf, have been violated, without a decision of any other court to support it.

In both cases, the strong public policy of enforcing the antitrust laws should override these other considerations or at least proscribe summary judgment.

8/ Citing its own very recent decision in Bushie v. Stenocord Corp., 460 F. 2d 116 (CA 9, 1972).

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The decision below affirms summary disposition of cases which challenge for the first time acquisitions in the bowling industry and which raise legal questions which will arise over and over again. The importance to the public requires this Court to review it.

III. The Case Presents an Important Question Concerning the Rights of a Potential Competitor Under Section 7 of the Clayton Act, that Has Not But Should Be Settled by This Court.

The Opinion below refers to Levy as a shareholder in another Los Angeles bowling center, as if he were asserting his antitrust rights on that fact alone.[9/]

The fact is that Petitioner Levy has standing to sue pursuant to Section 4 of the Clayton Act by reason of the acts of the Respondents forbidden by the antitrust laws. Section 4 draws no distinction between the rights of persons who are kept out of business and the rights of persons who are put out of

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9/ It was Respondents' position, concurred in by the district court, that therefore Levy had no standing.

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business by reason of acts forbidden by the antitrust laws, so long as they have the intent and means and have taken affirmative steps toward entry -- as had the Petitioner Levy. [See Martin v. Phillips Petroleum Company, 365 F. 2d 629, 633 (CA 5, 1966); Bowl America Incorporated v. Fair Lanes, Inc., 299 F. Supp. 1080, 1095 (D. C. Md. 1969); Denver Petroleum Corporation v. Shell Oil Company, 306 F. Supp. 289, 306-308 (D. C. Colo. 1969).]

Moreover, the Court of Appeals for the Second Circuit has held that Section 7 of the Clayton Act gives rise to a claim for money damages [Gottesman v. General Motors Corporation, 414 F. 2d 956, 960-961 (CA 2, 1969)]. 10/

Finally, if Petitioner Levy's claim is sustained, he would be entitled to a decree of divestiture, so as to enable him and others to bid. [Julius M. Ames Co. v. Bostich, Inc., 240 F. Supp. 521, 526 (D. C. N. Y. 1965); but cf. Burkhead v. Phillips Petroleum Co., 308 F. Supp. 120, 125 (D. C. Cal. 1970).]

None of these questions has been settled by this Court, but in the public interest, should be.

10/ It was Respondents' position in the courts below that Levy had no right to damages under Section 7.

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IV. The Decision Below Conflicts Implicitly With Decisions of This Court and of Other Courts of Appeal in a Wide Range of Antitrust Questions.

The district court made extensive findings and conclusions -- in Danning 32 pages, in Levy, 35 pages[11/] -- as if after trial, which upheld

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11/ In Trowler v. Phillips, 260 F. 2d 924, 926 (CA 9, 1958), the court stated:

> ". . . (A)ll too often a set of unnecessary findings of fact is the tell-tale flag that points the way to a discovery that summary judgment should not have been granted."

By making this point, Petitioners do not mean to disparage the district court. Although Petitioners submit he was in error, the learned trial judge did decide the controversy as one in antitrust.

Petitioners perceive the district court's basic error to have been that it segregated, compartmentalized, fragmented, and dismembered the violations, and wiped the slate clean after analysis of each component, whereas its duty was to look at the whole picture. [Continental Ore Co. v. Union Carbide Corp., 370 U.S. 690, 698-699 (1962); Lessig v. Tidewater Oil Co., 327 F. 2d 459, 466 (CA 9, 1964).]

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Respondents' every position, and which the Court of Appeals ignored for the most part, although they are important to the controversy once bankruptcy or commercial law is put aside.

The decisions below are in conflict with the many legal guidelines which this Court and the courts of appeal have established to govern controversies such as this one. 12/

1. The subject of a federal anti-trust suit may involve a local operation.

In Moore v. Mead's Fine Bread Co., 348 U.S. 115, 119-120 (1954), this Court stated:

> "The victim, to be sure, is only a local merchant; and no interstate transactions are used to destroy him. But the beneficiary is an interstate business. . . ."

Respondents argued below, in support of their parochial view of these cases, that Lieberthal v. North Country Lanes, 332 F. 2d 269 (CA 2, 1964), was dispositive and all that

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12/ The Court may wish to have all or some of these questions briefed.

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is involved in this controversy is a local bowling operation.

It is true, as they quoted, that "The operation of bowling alleys, without more, must be held to be a wholly intrastate activity." Add to that, Lieberthal was a landlord-owner of a bowling center and defendant was a bowling chain and not a producer or supplier such as Brunswick, and we have a different bowl game.

Here, Brunswick is a national producer or supplier and a national bowling chain, in an integrated monopoly position on a wholesale and retail level, which combined and conspired with a lessor to exclude bidders and competitors on a retail level in interstate commerce.

The fact that the cornerstone of the combination in restraint of trade was a local lease 13/ does not vitiate the wrong. As was stated in American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946):

> "It is not the form of the combination or the particular means used but the result to be achieved that

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13/ Note that the Court of Appeals decided that the lease was a major component of the busines

the statute condemns. It is not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful. Acts done to give effect to the conspiracy may be in themselves wholly innocent acts. Yet, if they are part of the sum of the acts which are relied upon to effectuate the conspiracy which the statute forbids, they come within its prohibition."

2. Elimination of a single competitor by joint action is a per se violation [Klors, Inc. v. Broadway-Hale Stores, 359 U.S. 207, 213 (1959)]. It is not even necessary that it affect price or supply [cf. United States v. General Motors Corp., 384 U.S. 127, 145-146 (1966)], although in the instant cases, the violation did affect price and supply, in that Brunswick admitted it had a firm policy regarding equipment returned to inventory and that it refused to sell to Levy except for a price above what it was owed on the equipment.

The fact, urged by Respondents and accepted by the district court, that there are thousands of independent operators, is entirely beside the point, since the elimination of one competitor is actionable under the antitrust laws [Klor's v. Broadway-Hale Stores, supra (Summary judgment reversed)].

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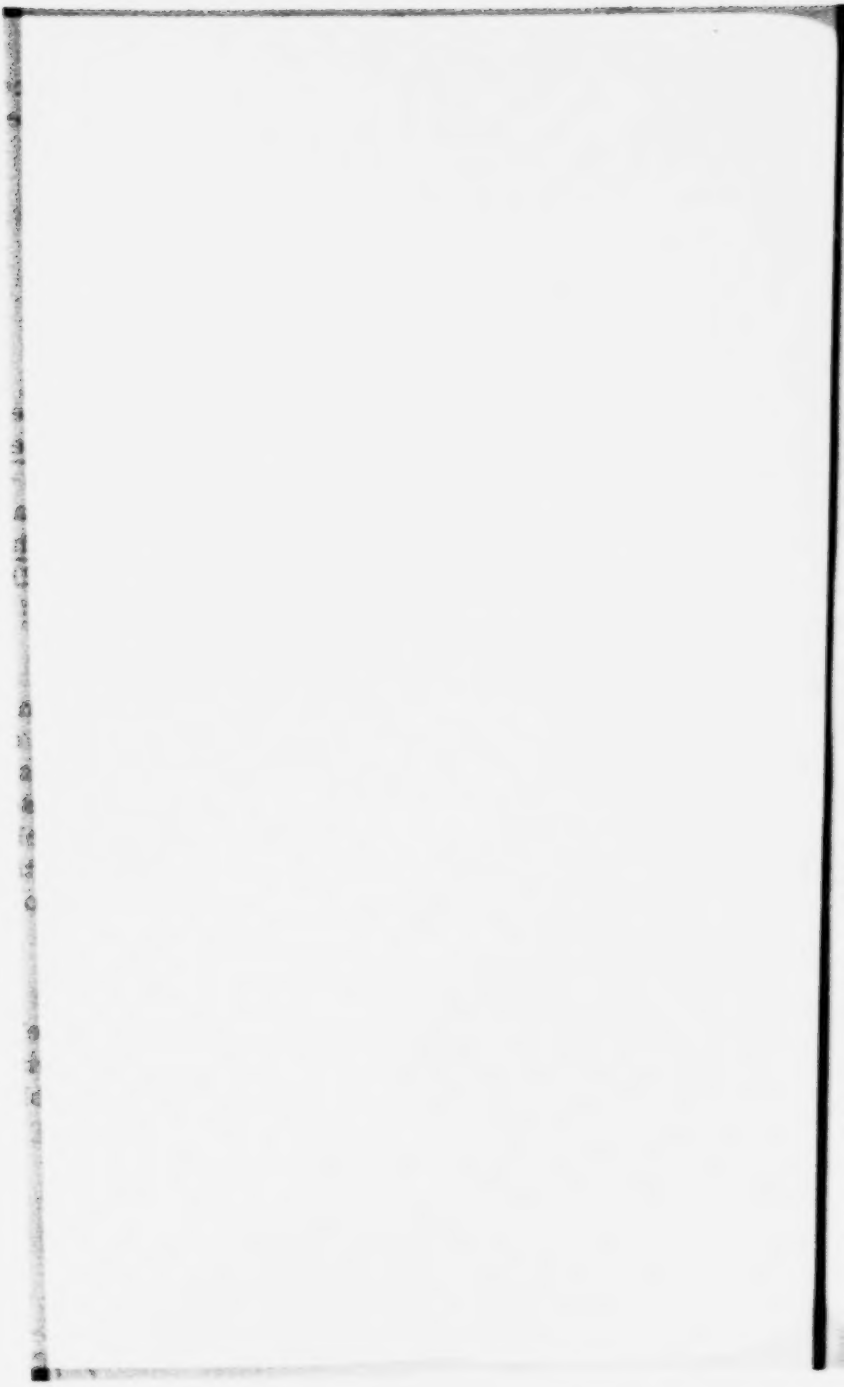
3. Respondent Malouf's acquiescence in Respondent Brunswick's conduct is actionable [cf. United States v. Paramount, 334 U.S. 131, 161 (1948)], even as a non-trader. [Nash v. United States, 229 U.S. 373, 379 (1913).]

4. Even if Respondent Brunswick's retail market is relatively small, its conduct here is actionable. Section 1 restraints are banned irrespective of the amount of commerce involved. [Times-Picayune Pub. Co. v. United States, 345 U.S. 594, 611 (1953)]; and the percentage of the market foreclosed by the vertical arrangement is not itself decisive. [Brown Shoe Co. v. United States, 370 U.S. 294, 329 (1962).]

Thus, the controversy here does not involve what the decision below makes it seem to involve, a technical question of bankruptcy or commercial law, where a corporation exercises business acumen to obtain a sharp deal for itself. Nor, does it involve, as again the decision below would make it appear, a private quarrel and the right of an ordinary producer or trader not to deal.

Petitioners submit that the Opinion below glosses over essential antitrust principles which should be considered by this Court in the public interest.



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CONCLUSION

This controversy is the first to involve acquisitions in the bowling industry. Its importance to the public cannot be exaggerated.

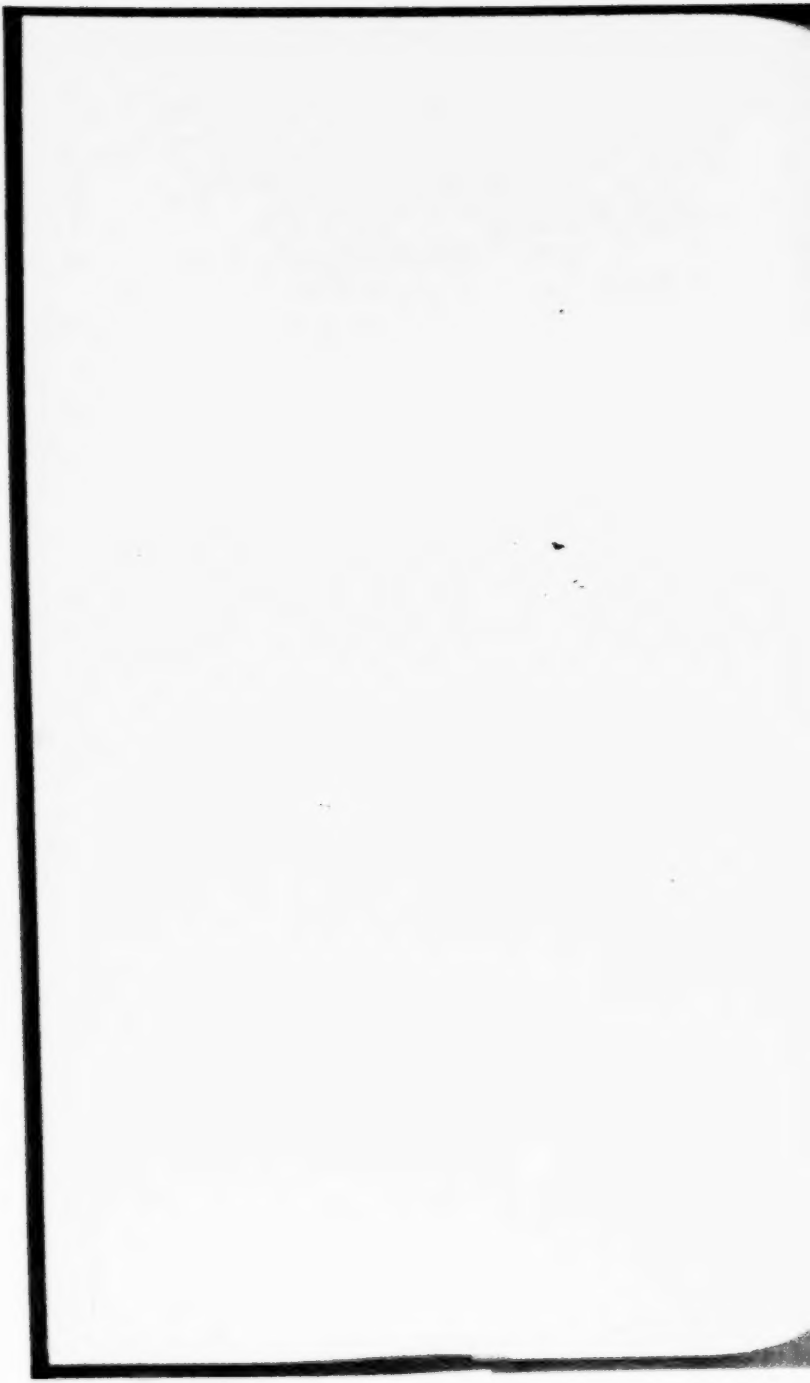
If indeed the bowling industry is sick, Petitioners should be given an opportunity to show that Brunswick's methods of acquisition are no cure; and if it and AMF are allowed to acquire more and more bowling centers, there will be less and less room for the independent operator, less and less competition, and more and more public injury.

A writ of certiorari to the Court of Appeals for the Ninth Circuit should issue.

Respectfully submitted,

BERNARD REICH

Attorney for Petitioners



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UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CURTIS B. DANNING, as Trustee in Bankruptcy of Matador Bowl, Inc., a California corporation, Bankrupt, *Plaintiff-Appellant,* vs. BRUNSWICK CORPORATION, a Delaware corporation, A. B. MALOUF, *Defendants-Appellees.*	No. 26,448
EMANUEL LEVY, *Plaintiff-Appellant,* vs. BRUNSWICK CORPORATION, a Delaware corporation, A. B. MALOUF, *Defendants-Appellees.*	No. 26,449

[September 18, 1972]

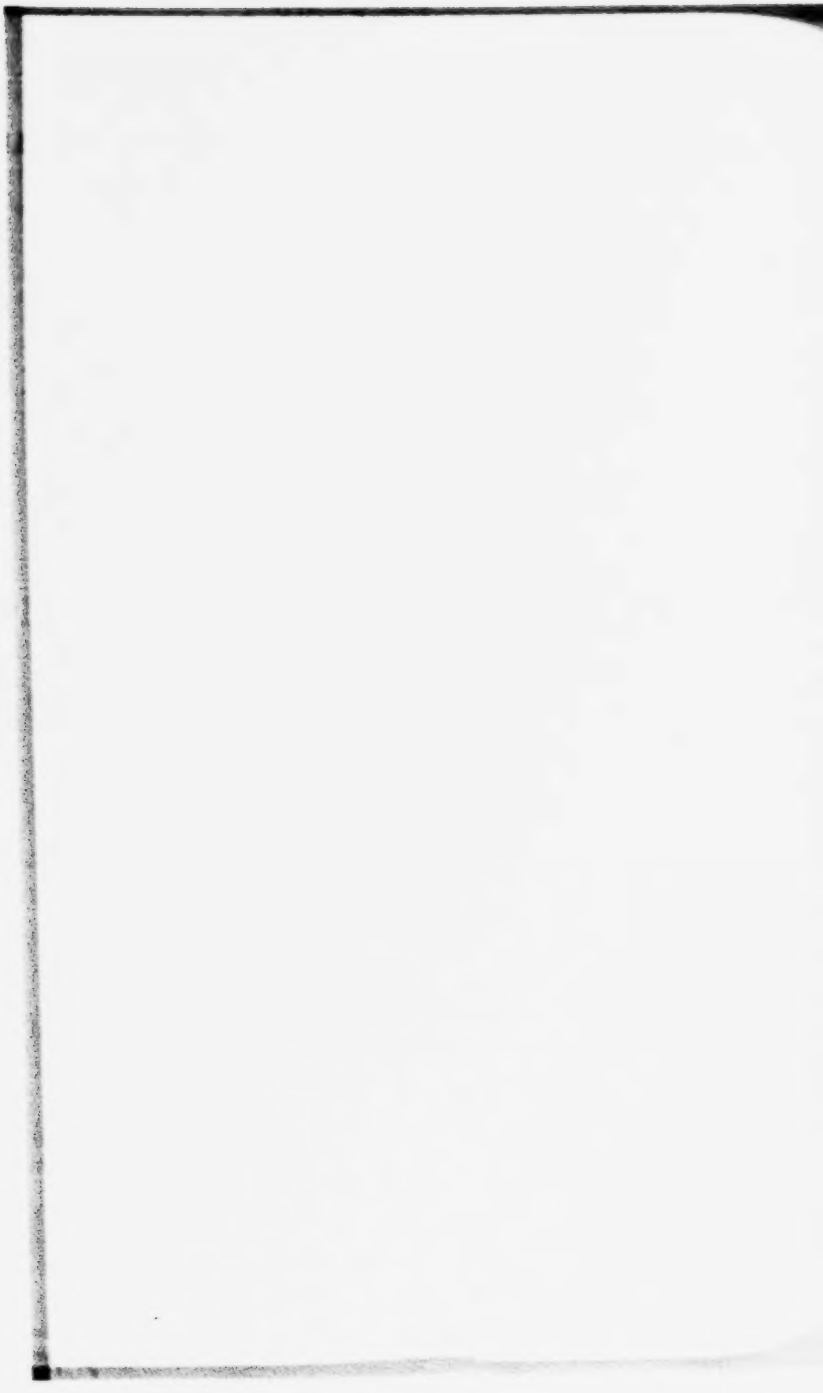
Appeal from the United States District Court
for the Central District of California

Before: KOELSCH and DUNIWAY, Circuit Judges, and ANDERSON,* District Judge.

KOELSCH, Circuit Judge:

Plaintiffs appeal from summary judgments entered in these two consolidated antitrust actions in favor of the defendants Brunswick Corporation and A. B. Malouf.

*Honorable J. Blaine Anderson, United States District Judge, Boise, Idaho, sitting by designation.



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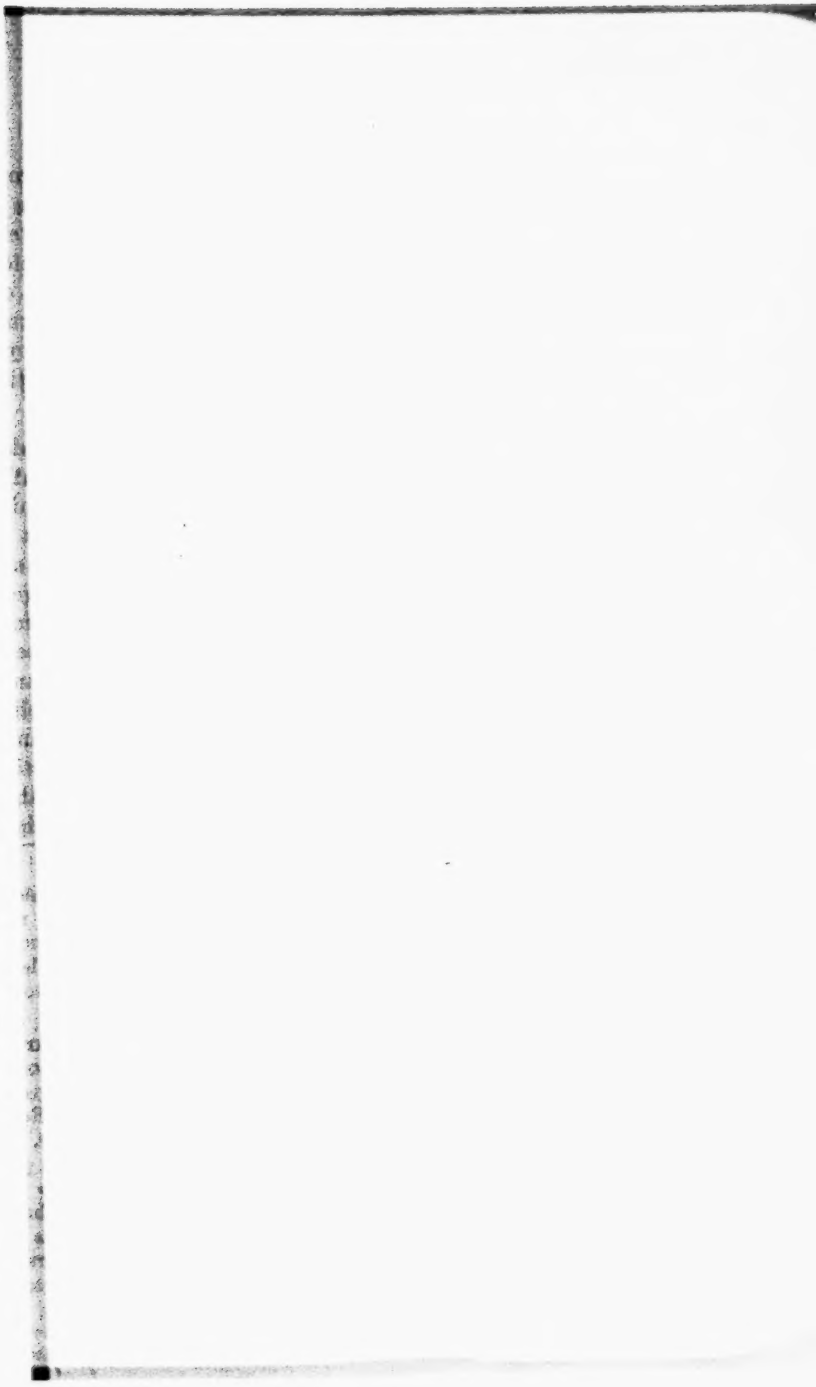
In 1960 Malouf granted a 25 year lease of improved real property in Los Angeles, California, to Richard Dow and wife on a rental payable in monthly installments. The Dows immediately assigned the lease to Matador Bowl, Inc., a corporation which they had organized to conduct a bowling alley and restaurant on the premises. To that end Matador then purchased from Brunswick, on conditional sales contracts, the necessary bowling alleys, pinsetters, etc., and apparently purchased from third parties restaurant and bar equipment.

The business failed to prosper. On December 29, 1965, Matador was adjudged a bankrupt, and Curtis B. Danning, the plaintiff in No. 26,448, was appointed and qualified as trustee to administer the estate. At that time Matador was heavily in arrears in its installment payments on the lease and a substantial balance remained owing on the conditional sales contracts. The intervention of bankruptcy prevented Malouf and Brunswick from retaking their property, at least until Matador's trustee had been afforded the opportunity provided by Section 70(b) of the Bankruptcy Act to either continue the contracts in force or to relinquish them;[1] but both were naturally anxious to salvage as much as they could from the venture and to protect their respective investments. So it was that Brunswick approached Malouf with a proposition that if Danning, the trustee, did not assert the right

[1] 11 U.S.C. §110(b) provides, in part:

"Within sixty days after the adjudication, the trustee shall assume or reject any executory contract, including unexpired leases of real property: *Provided, however,* That the court may for cause shown extend or reduce such period of time. Any such contract or lease not assumed or rejected within such time . . . shall be deemed to be rejected. * * *"

Section 70(b) is calculated to protect the interests of the bankrupt estate, by empowering the trustee to avoid such executory contracts as he deems burdensome or to assume those economically advantageous. Silverstein, Rejection of Executory Contracts in Bankruptcy and Reorganization, 31 U.CHI.L.REV. 467, 472 (1964). An assumption, of course, carries with it both the benefits (e.g., the right to continue in possession of leased premises) and the burdens (e.g., the obligation to pay both past due and future rents) of the contract. If, on the other hand, he rejects the contract, the estate is relieved of any future burdens imposed by the contract, but it may no longer avail itself of the contract's benefits (one of which, on the facts of this case, would be the increased value of the remaining assets of the estate).



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to assume the lease and conditional sales contracts that Brunswick would lease Malouf's property. Thus, Malouf would be assured of a solvent tenant and Brunswick would not have to remove its equipment and could and would continue the operation on the premises.[2] Malouf agreed and, on January 27, 1966, approximately a month after Matador's adjudication, he executed a lease to Brunswick. This lease, however, was not to be effective unless the trustee rejected the existing lease between Malouf and Matador's assignors.

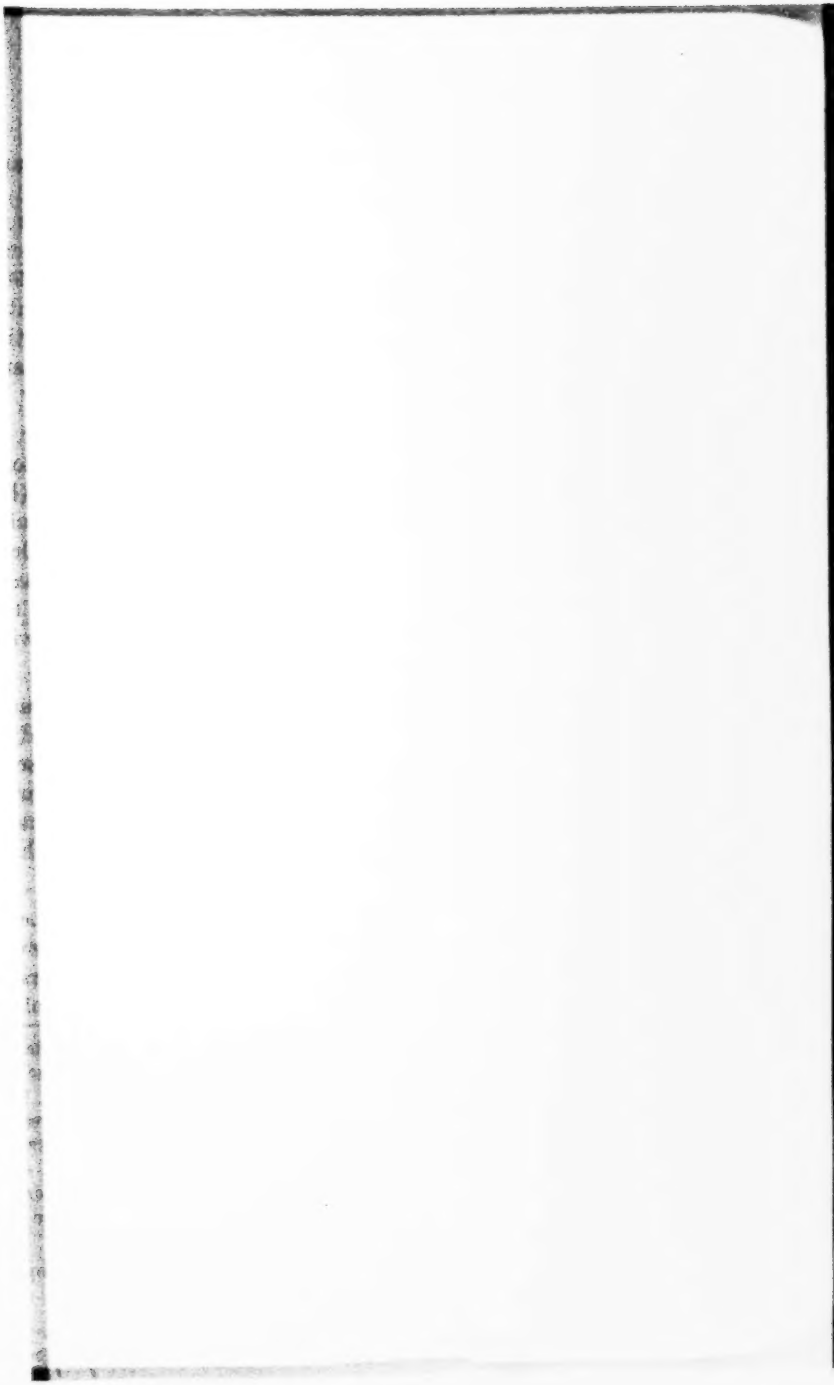
Emanuel Levy, the plaintiff in 26,449, was a shareholder in another Los Angeles bowling center. Shortly after Matador's adjudication, and within the 60 day period allowed by §70(b), Levy sought to negotiate with Brunswick for the bowling equipment. The details of the discussions are in dispute but it is clear from the record that Brunswick rejected all of Levy's proposals; although Levy also made inquiries of the trustee about the matter, it is equally clear that he made no attempt to deal with the trustee for either the lease or the bowling equipment.

The trustee did nothing to assume the lease or the contracts and in April 1966, more than 60 days following Matador's adjudication, conducted a sale of the bankrupt's remaining assets. These, of course, did not include the lease or the bowling equipment, because the trustee, by his nonaction, was deemed to have rejected the contracts and lease and to have relinquished whatever interest the estate had in those properties.

However, immediately before the sale was commenced, Levy and the trustee nevertheless demanded that Brunswick turn over both the leased premises and the bowling fixtures to the person making the highest bid for the property that was being sold.[3]

[2]Due to overdevelopment in the bowling center industry, a large number of centers were financially unsuccessful. Brunswick, as one of the two major manufacturers and sellers of bowling alley equipment, frequently had to repossess the equipment and faced a depressed resale market. To offset its losses resulting from the repossessions, Brunswick would sometimes take over the operation of centers which might be successfully revitalized until such time as a suitable buyer for the center could be found; this was done to, in effect, create a market for the repossessed equipment.

[3]This latter property consisted of restaurant equipment, a liquor license and an inventory of food and liquor.



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Brunswick refused. The sale proceeded, Brunswick was the sole bidder, and the sale was thereafter confirmed by the referee.[4]

Plaintiffs' claims, as reflected in the complaints, are essentially similar; each is rested upon Sections 1 and 2 of the Sherman Act and Section 7 of the Clayton Act. In substance the trustee and Levy contend that Malouf and Brunswick, by their lease, conspired to foreclose acquisition of the Matador business at the trustee's sale by anyone but Brunswick and enhanced Brunswick's monopoly in the bowling business.[5]

The basic defect in these contentions, briefly stated, lies in the fact that at the time of the sale the trustee had no business to sell. He had not seen fit nor taken the steps necessary to preserve the business as an integral unit, but had allowed the major components to revert to the creditor-owners.[6] Thus, neither

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[4]We note that the trustee took no steps to set aside the sale in the Bankruptcy Court.

[5]The relevant allegation appearing in Levy's complaint is that:

> "Defendants, each well knowing and acquiescing in the actions of the others, did in 1965 and 1966 contract, combine and conspire to and did unreasonably restrain and monopolize trade in violation of Sections 1 and 2 of the Sherman Act . . . by effectively eliminating plaintiff, a responsible bidder, from bidding competitively in the bankruptcy sale for all the assets of the Bankrupt, which assets were acquired by Brunswick in violation of Section 7 of the Clayton Act instead of to plaintiff; the effect of such acquisition substantially lessened competition and tended to and did enhance Brunswick's monopoly in the relevant market. . . ."

Danning's allegations are substantially similar, except as to the effect of the asserted antitrust violations; in that respect Danning alleged that Brunswick, by excluding competitive bidding at the trustee's sale, diminished the value of the bankrupt estate.

[6]In an affidavit filed in the District Court, Danning explained his failure to assume the executory contracts as follows:

> "It would have been foolhardy for me as the trustee to have affirmed leases and conditional sales agreements without an operator, and it was defendants' conduct which in effect prevented me from obtaining an operator such as plaintiff Levy who was eminently qualified in every respect."

This is "circular reasoning with a vengeance," Stevenson v. Diebold, Inc., 422 F.2d 1228, 1233 (9th Cir. 1970), cert. denied, 400 U.S. 832, revealing a basic misconception about the powers of a bankruptcy trustee. The lease between defendants was conditional both in terms and in law; executed, as noted earlier, within the 60 day period of the trustee's

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Malouf nor Brunswick were obliged to accede to the trustee's demands.

Nor do the antitrust laws make unlawful either Malouf's choice of tenant for his property, or Brunswick's refusal to allow Levy to take over the purchase contracts on which Matador had defaulted. After the trustee had rejected the lease and conditional sales contracts, Malouf and Brunswick were free to deal with each other or with anyone else, or not to deal at all, so long as their refusal to deal with Levy did not restrain trade. *Compare Bushie v. Stenocord Corp.*, 460 F.2d 116 (9th Cir. 1972), *Ricchetti v. Meister Brau, Inc.*, 431 F.2d 1211 (9th Cir. 1970), cert. denied, 401 U.S. 939, and *Jos. E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), cert. denied, 396 U.S. 1962, reh. denied, 397 U.S. 1003, with *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962), *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960), and *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9th Cir. 1964), cert. denied, 377 U.S. 993. None of the facts appearing in this record permit an inference that Malouf and Brunswick conspired to restrain trade, or that Brunswick's operation of a bowling center at the Matador site would affect competition in the relevant market in the Los Angeles area.[7]

"While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be

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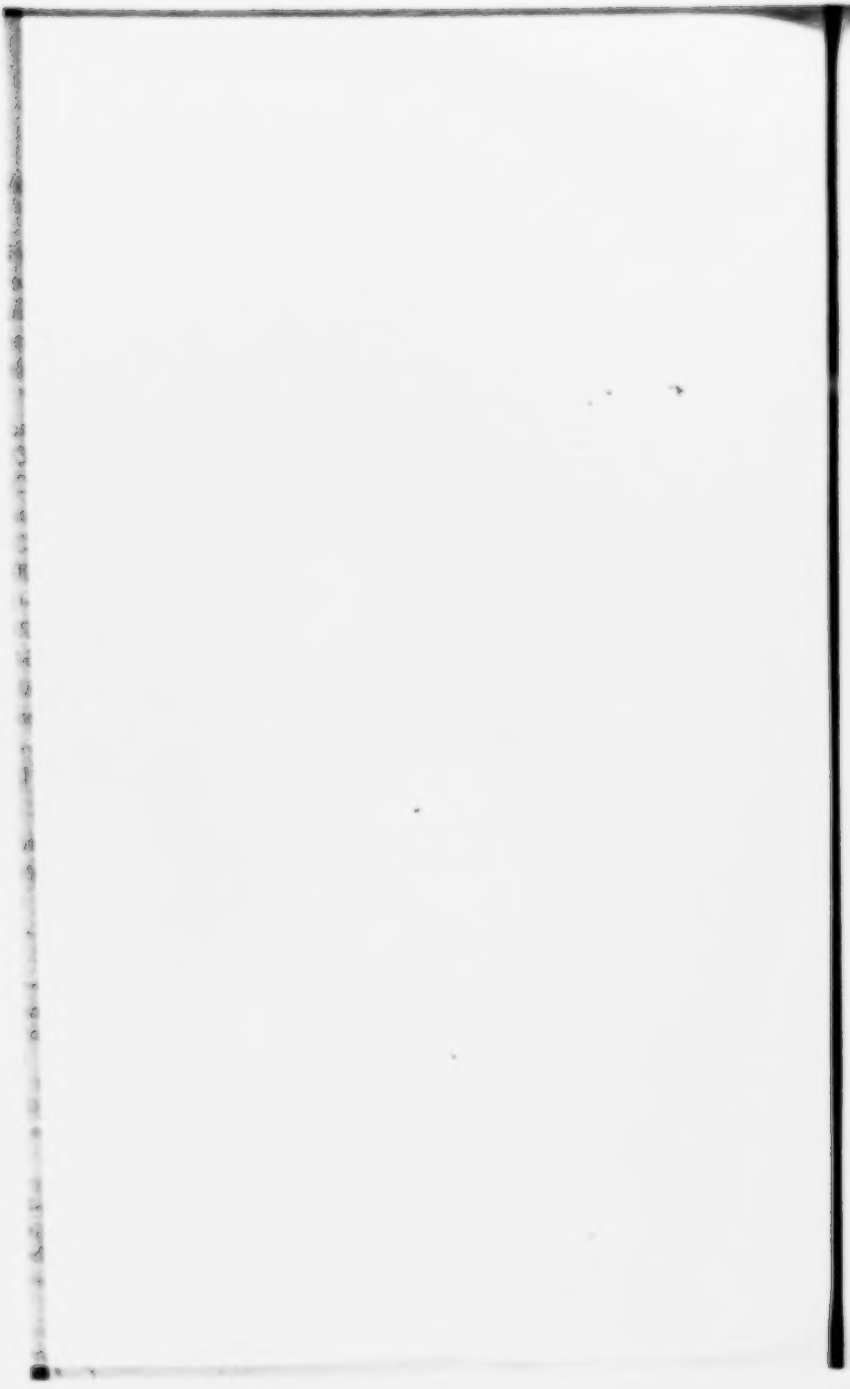
option, it would have been rendered useless to the defendants and unenforceable had the trustee elected to assume the bankrupt's lease with Malouf, which was a prior lease. Thus, if the trustee had found his prospective operator (Levy), he could have exercised his option to assume the lease, and put Levy in possession of the premises. Neither defendant could have prevented him, by a lease or otherwise, from doing so.

[7]Brunswick, during the period of the events under consideration, operated 22 bowling centers, approximately two percent of the total number of centers, in the State of California. Nearly all of them were acquired after the previous owners had defaulted on their contracts to purchase bowling fixtures and equipment, and after Brunswick had repossessed the equipment.



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entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint." *First National Bank v. Cities Service Co.*, 391 U.S. 253, 290 (1968). We conclude that the summary judgments were properly granted.

The judgments are affirmed.

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APPENDIX B

APPLICABLE STATUTES

1. Title 15 U.S.C. Section 1 (Section 1 of the Sherman Act), so far as here pertinent states:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal. . . ."

2. Title 15 U.S.C. Section 2 (Section 2 of the Sherman Act) provides:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, or monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court."

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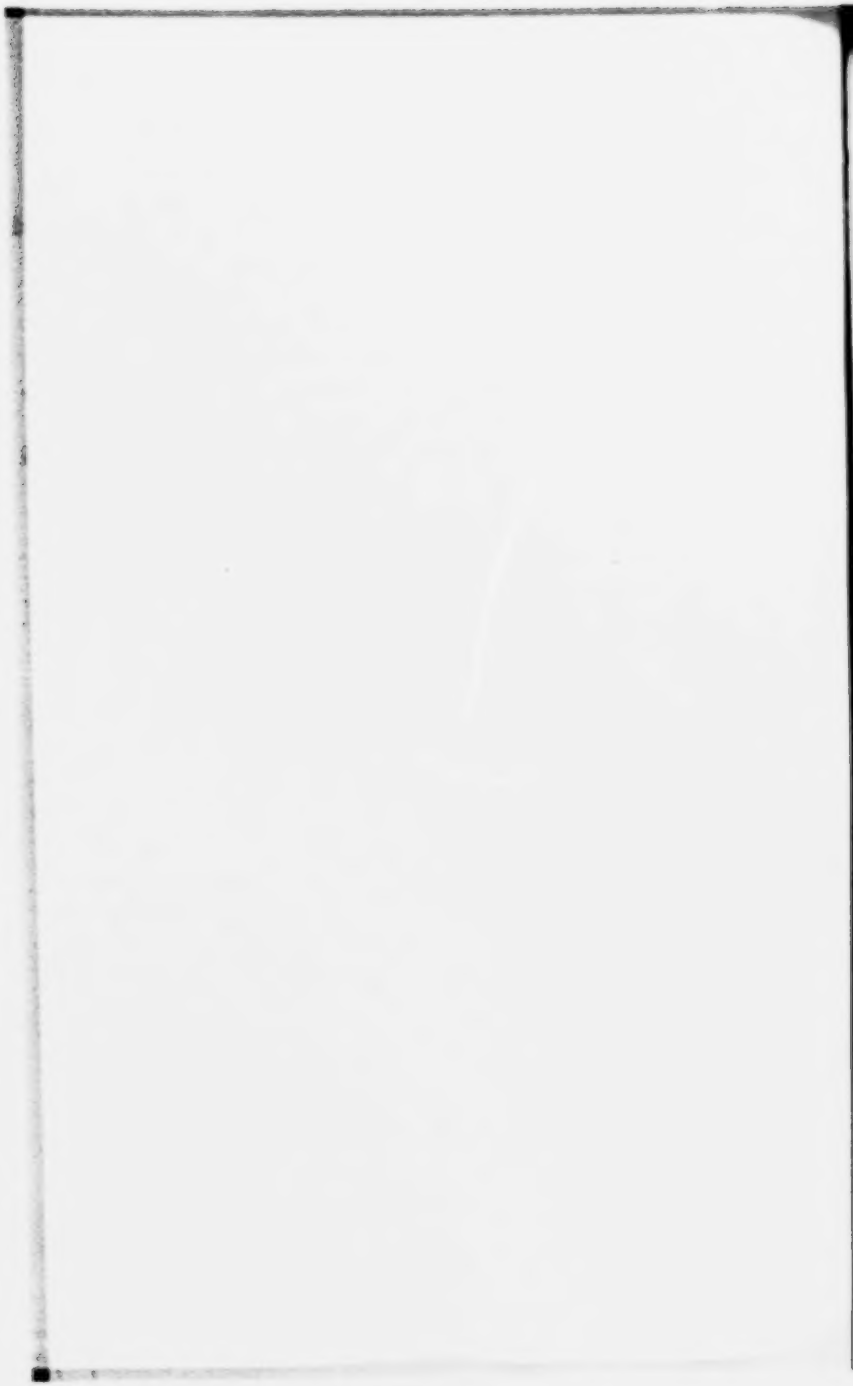
3. Title 15 U.S.C. Section 15 (Section 4 of the Clayton Act) provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

4. Title 15 U.S.C. Section 18 (Section 7 of the Clayton Act), states so far as pertinent:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly.



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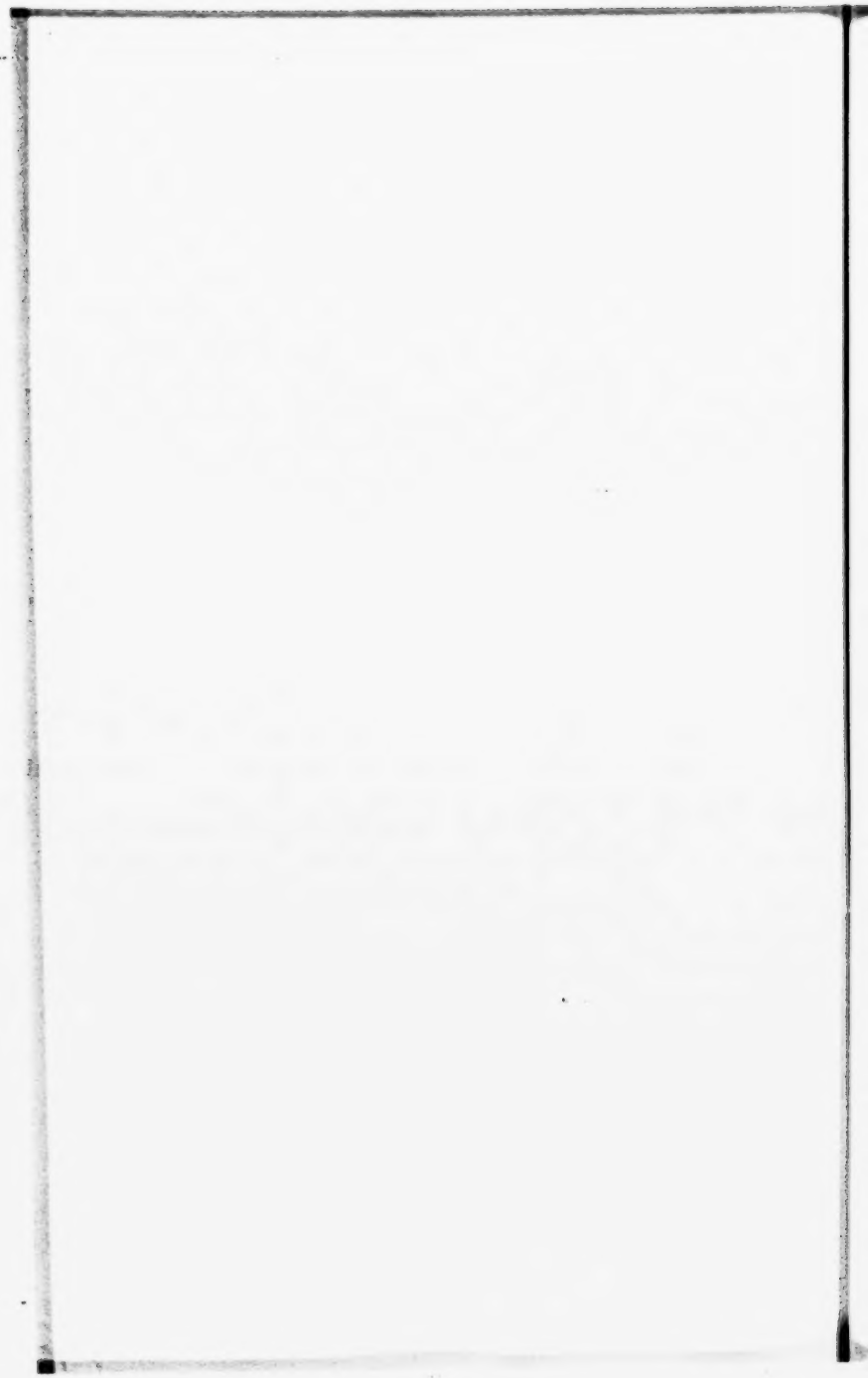
"No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies otherwise, may be substantially to lessen competition, or to tend to create a monopoly."

5. Title 11 U.S.C. Section 110 (Section 70(b) of the Bankruptcy Act) states, so far as pertinent:

"(b) The trustee [in bankruptcy] shall assume or reject an executory contract, including an unexpired lease of real property, within sixty days after the adjudication or within thirty days after the qualification of the trustee, whichever is later, but the court may for cause shown extend or reduce the time. Any such contract or lease not assumed or rejected within that time shall be deemed to be rejected . . . ."



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6. Title 18 U.S.C. Section 151, clause 5 states, so far as pertinent:

> "Whoever knowingly and fraudulently gives, offers, receives or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof, for acting or forbearing to act in any bankruptcy proceeding . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both."